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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

MIKE GLEASON - Chairman  
WILLIAM A. MUNDELL  
JEFF HATCH-MILLER  
KRISTIN K. MAYES  
GARY PIERCE

Arizona Corporation Commission

**DOCKETED**

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IN THE MATTER OF THE APPLICATION OF  
CBeyond COMMUNICATIONS, LLC FOR  
APPROVAL OF A CERTIFICATE OF  
CONVENIENCE AND NECESSITY TO  
PROVIDE FACILITIES-BASED LOCAL  
EXCHANGE AND RESOLD LONG DISTANCE  
TELECOMMUNICATIONS SERVICES IN  
ARIZONA.

DOCKET NO. T-20497A-06-0802

**70644**

DECISION NO. \_\_\_\_\_

**OPINION AND ORDER**

DATE OF HEARING: September 11, 2008

PLACE OF HEARING: Phoenix, Arizona

ADMINISTRATIVE LAW JUDGE: Yvette B. Kinsey

APPEARANCES: Mr. Michael W. Patten, ROSHKA DEWULF &  
PATTEN, PLC, on behalf of Cbeyond Communications,  
LLC; and

Mr. Kevin Torrey, Staff Attorney, Legal Division on  
behalf of Utilities Division of the Arizona Corporation  
Commission.

**BY THE COMMISSION:**

On December 28, 2006, Cbeyond Communications, LLC ("Cbeyond" or "Applicant") filed with the Arizona Corporation Commission ("Commission") an application for a Certificate of Convenience and Necessity ("CC&N") to provide facilities-based local exchange and resold long distance telecommunications services in Arizona. The Applicant's application also petitioned the Commission for a determination that its proposed services be classified as competitive.

On January 17, 2007, the Commission's Utilities Division Staff ("Staff") issued a Letter of Insufficiency and First Set of Data Requests to Cbeyond.

On March 19, 2007, Cbeyond filed responses to Staff's First Set of Data Requests.

1 On March 23, 2007, Cbeyond filed additional information in response to Staff's Data  
2 Requests.

3 On April 27, 2007, Staff issued a second Letter of Insufficiency and Second Set of Data  
4 Requests to Cbeyond.

5 On May 31, 2007, Staff issued a third Letter of Insufficiency and Third Set of Data Requests  
6 to Cbeyond.

7 On June 5, 2007, Cbeyond filed responses to Staff's Third Set of Data Requests.

8 On October 16, 2007, Applicant filed additional information in support of its application.

9 On May 1, 2008, Applicant filed additional information in support of its application.

10 On July 17, 2008, Staff docketed a Staff Report recommending approval of Cbeyond's  
11 application and recommending that Cbeyond's proposed services be classified as competitive.

12 On July 28, 2008, by Procedural Order, a hearing was set to commence on September 11,  
13 2008, and other procedural deadlines were established.

14 On August 11, 2008, Cbeyond docketed a Notice of Filing Affidavit of Publication, showing  
15 publication of the application and hearing date had been published in the *Arizona Republic*, a  
16 newspaper of general circulation, on August 5, 2008.

17 On September 11, 2008, a full public hearing was convened before a duly authorized  
18 Administrative Law Judge of the Commission at its offices in Phoenix, Arizona. The Applicant and  
19 Staff appeared through counsel and presented evidence and testimony. At the conclusion of the  
20 hearing, the Applicant was directed to file, as a late-filed exhibit, Cbeyond's financial statements for  
21 2007.

22 On September 12, 2008, Applicant filed its fourth quarter 2007 financial numbers.

23 After receipt of the late-filed exhibits, the matter was taken under advisement pending  
24 submission of a Recommended Opinion and Order to the Commission.

25 \* \* \* \* \*

26 Having considered the entire record herein and being fully advised in the premises, the  
27 Commission finds, concludes, and orders that:  
28

**FINDINGS OF FACT**

1. Cbeyond is a foreign limited liability corporation, incorporated in the State of Delaware and authorized to transact business in the Arizona.

2. Cbeyond is a wholly-owned subsidiary of Cbeyond, Inc., a publicly traded corporation.<sup>1</sup>

3. On December 28, 2006, Cbeyond filed an application for a CC&N to provide facilities-based local exchange and resold long distance telecommunications services within the State of Arizona. The application also seeks a determination that Cbeyond's proposed services be classified as competitive.

5. Staff recommends approval of Cbeyond's application for a CC&N to provide facilities-based local exchange and resold long distance telecommunications services in Arizona and that Cbeyond's proposed services be classified as competitive.

6. Staff further recommends that:

- a.) Cbeyond comply with all Commission Rules, Orders, and other requirements relevant to the provision of intrastate telecommunications services;
- b.) Cbeyond abide by the quality service standards that were approved by the Commission for Qwest in Docket No. T-01051B-93-0183;
- c.) Cbeyond be prohibited from barring access to alternative local exchange service providers who wish to serve areas where Cbeyond is the only provider of local exchange service facilities;
- d.) Cbeyond be required to notify the Commission immediately upon changes to Cbeyond's name, address or telephone number;
- e.) Cbeyond cooperate with Commission investigations including, but not limited to customer complaints;
- f.) Cbeyond's rates be classified as competitive;
- g.) Although Staff considered the fair value rate base ("FVRB") information submitted by Cbeyond, the fair value information provided should not be given substantial weight in this analysis;
- h.) Cbeyond offer Caller ID with the capability to toggle between blocking and unblocking the transmission of the telephone number at no charge;

<sup>1</sup> Application at 2.

- i.) Cbeyond offer Last Call Return service that will not return calls to telephone numbers that have the privacy indicator activated;
- j.) Cbeyond submit interexchange tariffs which state it does not collect advances, deposits and/or prepayments;
- k.) Cbeyond be authorized to discount its rates and service charges to the marginal cost of providing the services;
- l.) Cbeyond file with the Commission in this docket, copies of the certifications sent to the FCC stating the Company's compliance with the FCC's rules concerning CPNI, and that Cbeyond file these certifications with the Commission for 24 months subsequent to a Decision in this matter; and
- m.) Cbeyond continue operating under the operating procedures established by the Company to ensure compliance with the FCC's CPNI rules as specified in the Consent Decree until further Order of the Commission.

7. Staff further recommends that Cbeyond comply with the following conditions and if Cbeyond fails to comply, the CC&N should be null and void, after due process without further Order of the Commission, and that no time extensions should be granted.

- a. Cbeyond shall docket conforming tariffs for each service within its CC&N within 365 days from the date of an Order in this matter or 30 days prior to providing service, whichever comes first. The tariffs submitted shall coincide with the application and shall state that the Applicant does not collect advances deposits and/or prepayments from its customers.
- b. Cbeyond shall:
  - 1. Procure a performance bond or irrevocable sight draft Letter of Credit in the amount of \$110,000. The minimum performance bond or irrevocable sight draft Letter of Credit amount of \$110,000 should be increased if at any time it would be insufficient to cover advances, deposits, and/or prepayments collected from the Applicant's customers. The performance bond or irrevocable sight draft Letter of Credit amount should be increased in increments of \$55,000. This increase should occur when the total amount of the advances, deposits, and prepayments is within \$11,000 of the performance bond or irrevocable sight draft Letter of Credit amount.
  - 2. File the original performance bond or irrevocable sight draft Letter of Credit with the Commission's Business Office and copies of the performance bond or irrevocable sight draft Letter of Credit with Docket Control, as a compliance item in this docket, within 30 days of

1 the effective date of a decision in this matter. The performance bond or  
2 irrevocable sight draft Letter of Credit must remain in effect until  
3 further order of the Commission. The Commission may draw on the  
4 performance bond or irrevocable sight draft Letter of Credit, on behalf  
5 of, and for the sole benefit of the Company's customers, if the  
6 Commission finds in its discretion, that the Company is in default of its  
7 obligations arising from its Certificate. The Commission may use the  
8 performance bond or irrevocable sight draft Letter of Credit funds, as  
9 appropriate, to protect the Company's customers and the public interest  
10 and to take any and all actions the Commission deems necessary, in its  
11 discretion, including, but not limited to, returning prepayments or  
12 deposits collected from the Company's customers.

8 **Technical/ Managerial Capabilities**

9 8. Cbeyond's witness, Mr. William Weber, Chief Administrative Officer for Cbeyond  
10 Inc., parent company to Cbeyond, LLC, testified that Cbeyond currently provides  
11 telecommunications services in California, Colorado, Georgia, Illinois, Texas, Florida and Minnesota.  
12 (Tr. at 7) Mr. Weber described the company's approach as being "an inch wide and a mile deep,"  
13 meaning Cbeyond serves a narrow set of customers - businesses with between five and 249  
14 employees - but tries to have deep penetration within its specific market. Mr. Weber testified that  
15 Atlanta was the first city Cbeyond provided service in and they have been in the Atlanta market for  
16 six years and currently hold 15 percent of the market for businesses with between five and 249  
17 customers. (Tr. at 9)

18 9. Cbeyond is also authorized to provide telecommunications services in Massachusetts,  
19 Michigan, Missouri, New York, North Carolina, Pennsylvania, Virginia, Washington and the District  
20 of Columbia.

21 10. In Arizona, Cbeyond plans to offer a variety of telecommunications services. Mr.  
22 Weber testified that Cbeyond has one of the lowest churn rates in the industry and that all of the  
23 company's growth has been "organic" and not acquired through acquisition of other companies. He  
24 further stated that in each city where Cbeyond does business 60 new sales employees are hired, with  
25 an average annual salary of \$80,000. (Tr. at 10)

26 11. Mr. Weber stated that Cbeyond will be providing service using a T-1 line to bring  
27 service to the customers' locations and the entire process will be managed over Cbeyond's private  
28 network. (Tr. at 12)

12. As a part of its application, Cbeyond submitted information on its Board of Directors ("Board") which showed that the Board possesses sufficient managerial experience in the telecommunications industry to provide the services requested in the application.

13. Based on Cbeyond's experience in the telecommunications industry, and the experience of its managerial staff, Cbeyond possesses the technical and managerial capabilities to provide the telecommunications services it is requesting in Arizona.

**Financial Capabilities**

14. Cbeyond's witness testified that the company has been growing at over 30 percent per year for the last six years, and that revenues are expected to reach approximately \$350 to \$355 million for 2008. He further testified that the company has no debt and has never been through bankruptcy. (Tr. at 10)

15. According to Cbeyond's application, Cbeyond will rely on the financial resources of its parent company.

16. Cbeyond filed as a late-filed exhibit, the fourth quarter 2007 financial results for its parent company Cbeyond Inc., and its subsidiaries. According to the docketed press release, Cbeyond, Inc., posted revenues of \$76.9 million, net income of \$12.5 million and total adjusted earnings before interest, taxes depreciation and amortization of \$14 million for the fourth quarter ending December 31, 2007.

17. The Company also provided audited financial statements for its parent company for the year ending December 31, 2006. The Staff Report shows the company's parent listed assets of \$144,393; equity of \$91,108; and a net income of \$7,780 for the above time period.

18. Cbeyond's tariff states it may collect deposits from its local exchange or interexchange service customers.

19. All CC&Ns for facilities-based local exchange service must be secured by a minimum bond or irrevocable sight draft letter of credit in the amount of \$100,000.

20. CC&Ns for resold long distance service require each Applicant to secure a minimum bond or irrevocable sight draft letter of credit in the amount of \$10,000 if the Applicant may collect prepayments or advances.

21. Cbeyond should be required to secure a performance bond or irrevocable sight draft letter of credit in the aggregate amount of \$110,000 for its proposed services.

22. Pursuant to Arizona Administrative Code ("A.A.C") R-14-2-1107, if Cbeyond desires to discontinue service in Arizona it must file an application with the Commission, and notify its customers and the Commission sixty (60) days prior to filing the application to discontinue service. Further, Cbeyond's failure to meet the requirements of the rule will result in a forfeiture of Cbeyond's performance bond or irrevocable sight draft letter of credit.

23. Cbeyond has the financial capability to provide the services proposed in its application.

#### **Rates and Charges**

24. Pursuant to A.A.C. R-14-2-1109, Cbeyond may charge rates for service that are not less than its total service long-run incremental costs of providing service.

25. Cbeyond's proposed rates are for competitive services. In general, rates for competitive services are not set according to the rate of return regulation.

26. Cbeyond will have to compete with incumbent local exchange carriers ("ILECs") and various competitive local exchange carriers ("CLECs") and interexchange carriers providing telecommunications services.

27. In the competitive environment Cbeyond will be operating in, Cbeyond will not be able to exert any market power and the competitive process will result in rates that are just and reasonable.

28. Although Staff considered Cbeyond's FVRB in its analysis of the application, Staff concluded Cbeyond's FVRB is zero, and therefore too small to be useful in a FVRB analysis.

29. Cbeyond's proposed rate are just and reasonable and should be adopted.

30. Cbeyond plans to serve a narrow market consisting of businesses that have between five and 249 employees.

31. Pursuant to A.A.C. R-14-2-1308(A) and federal laws and rules, Cbeyond will make number portability available to facilitate the ability of customers to switch between authorized local carriers within a given wire center without changing their telephone number and without impairment



1 to quality, functionality, reliability or convenience of use.

2 32. In compliance with A.A.C. R-14-2-1204, all telecommunications service providers  
3 that interconnect into the public switched network shall provide funding for the Arizona Universal  
4 Fund ("AUSF").

5 33. Cbeyond will contribute to the AUSF as required by the A.A.C., and shall make  
6 necessary monthly payments as required under A.A.C. R-14-2-1204 (B).

7 34. In the areas where Cbeyond is the only local exchange service provider, Cbeyond is  
8 prohibited from barring access to alternative local exchange service providers who wish to serve the  
9 area.

10 35. Cbeyond will provide all customers with 911 and E911 service where available, or  
11 will coordinate with ILECs, and emergency service providers to facilitate the service.

12 36. Pursuant to prior Commission Decisions, Cbeyond may offer customer local area  
13 signaling services such as Caller ID and Call Blocking, so long as the customer is able to block or  
14 unblock each individual call at no additional cost.

15 37. Cbeyond must also offer Last Call Return service, which will not allow the return of  
16 calls to the telephone numbers that have the privacy indicator activated.

17 **Complaint History**

18 38. Cbeyond has not had an application for service denied, or revoked, in any state.

19 39. Cbeyond has no outstanding complaints in Arizona.

20 40. In April 2006, the Federal Communications Commission ("FCC") issued a Notice of  
21 Apparent Liability for Forfeiture ("NAL") to Cbeyond for Cbeyond's failure to produce and make  
22 public its annual certificate stating Cbeyond had adequate operating procedures to ensure compliance  
23 with Customer Proprietary Network Information ("CPNI").<sup>2</sup>

24 41. For its violation, Cbeyond was liable for a monetary forfeiture of \$100,000 for non-  
25 compliance with FCC rules and the CPNI order.

26  
27 <sup>2</sup> See 47 C.F.R. § 64.2009(e); Implementation of the Telecommunications Act of 1996: Telecommunications Carriers'  
28 Use of Customer Proprietary Network Information and Other Customer Information and Implementation of the Non-  
accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, Order and Further  
Notice of Proposed Rule Making, 13 FCC Rcd 8061(1998) ("CPNI Order").



1           42.     Cbeyond's witness testified that in 2005, Cbeyond discovered that it did not have the  
2 required letter on file and immediately brought the violation to the FCC's attention and the company  
3 began to review its CPNI practices. (Tr. at 23) According to the witness, during the review Cbeyond  
4 discovered that it had a written policy regarding the CPNI rules, but that the policies were not being  
5 monitored effectively. (Tr. at 23) The witness testified that the FCC found no evidence that the  
6 policy had been violated, even without effective monitoring. (Tr. at 23)

7           43.     Cbeyond's witness testified that at the same time the FCC began investigating the  
8 company's CPNI violation, a competitor, Bell South, alleged that Cbeyond employees had been  
9 fraudulently signing customer's letters of authorization ("LOA"). According to the witness, Bell  
10 South's allegations were never proven and Bell South was unable to identify one customer's  
11 information that had been improperly obtained by Cbeyond employees in violation of the CPNI rules.  
12 (Tr. at 24)

13           44.     On October 16, 2007, the FCC and Cbeyond entered into a Consent Decree. The  
14 Consent Decree states that the NAL is terminated; Cbeyond shall voluntarily contribute to the U. S.  
15 Treasury \$200,000; Cbeyond shall annually submit to the FCC certification that it is in compliance  
16 with the CPNI rules; and Cbeyond shall continue with operating procedures established by the  
17 company to ensure continued compliance with the CPNI rules.

18           45.     The witness testified that since the CPNI violation, Cbeyond has instituted an internal  
19 audit group, consisting of an attorney, paralegal, and a complaint and operations specialist. The  
20 witness stated the audit group monitors the company's compliance and the operations specialist helps  
21 to bridge the gap between operations and legal issues. (Tr. at 25)

22           46.     Cbeyond's witness stated the company has taken additional steps to ensure the CPNI  
23 rules are followed. They include: 1) requiring every Cbeyond employee who comes in contact with  
24 customer information to certify annually that they understand the CPNI rules and that violation of the  
25 CPNI rules could lead to discipline and termination; 2) Cbeyond has installed a new computer system  
26 that monitors each time CPNI information is accessed and the information is stored in a database so if  
27 there is an allegation, the company can see who has accessed the information; and 3) each sales  
28 branch now has one person who is responsible for verifying that LOAs are signed by customers and

1 filled out properly. (Tr. at 27)

2 47. Staff's Report states the Consent Decree is scheduled to expire on October 5, 2009.

3 48. Staff also obtained complaint information on Cbeyond from five State Commissions,  
4 which included California, Colorado, Georgia, Illinois, and Texas. Cbeyond had no complaints filed  
5 in California. In Colorado, Cbeyond had 34 complaints filed for the period of June 2006 to June  
6 2008, but all have been closed. Staff noted that five of the complaints filed in Colorado were  
7 resolved in favor of the customer and included one billing, one cramming and three slamming  
8 complaints. In Georgia, Cbeyond had 39 complaints filed from 2001 to 2007, and all have been  
9 closed. Three complaints were filed in Illinois from September 2006 to January 2007, and all have  
10 been resolved. Cbeyond had 30 complaints filed in Texas from March 2005 to December 2006, but  
11 only two of the complaints were resolved in favor of the customer.

12 49. We find Staff's recommendations reasonable, except that Staff's recommendation in  
13 Finding of Fact 6 (I), should be modified to reflect that Cbeyond file its CPNI certifications with the  
14 Commission for 24 months beginning the first day it begins service in Arizona. Further, Staff's  
15 recommendations should be modified to include that if Staff believes Cbeyond is out of compliance  
16 with federal or state rules and laws, within that 24 month period, Staff shall seek an Order to Show  
17 Cause that requires Cbeyond to appear and show cause why its CC&N should not be revoked.

18 50. The rates proposed herein are for competitive services.

19 51. Applicant's rates, as stated in the proposed tariffs, are just and reasonable and should  
20 be approved.

### 21 CONCLUSIONS OF LAW

22 1. Applicant is a public service corporation within the meaning of Article XV of the  
23 Arizona Constitution and A.R.S. §§ 40-281 and 40-282.

24 2. The Commission has jurisdiction over Applicant and the subject matter of the  
25 application.

26 3. Notice of the application was given in accordance with the law.

27 4. A.R.S. § 40-252 allows a telecommunications company to file an application for a  
28 CC&N to provide competitive telecommunications services.

5. Pursuant to Article XV of the Arizona Constitution, as well as the Arizona Revised Statutes, it is in the public interest for the Applicant to provide the telecommunications services set forth in its application.

6. Applicant is a fit and proper entity to receive a CC&N authorizing it to provide competitive facilities-based local exchange telecommunications services in Arizona, subject to Staff's recommendations set forth herein.

7. The telecommunications services that Applicant intends to provide are competitive within Arizona.

8. Pursuant to Article XV of the Arizona Constitution as well as the Competitive Rules, it is just and reasonable and in the public interest for Applicant to establish rates and charges that are not less than the Applicant's total service long-run incremental costs of providing the competitive services approved herein.

9. Staff's recommendations as modified herein are reasonable and should be adopted.

## ORDER

IT IS THEREFORE ORDERED that the application of Cbeyond Communications, LLC, for a Certificate of Convenience and Necessity for authority to provide competitive facilities-based local exchange and resold long distance telecommunications services within the State of Arizona, is hereby granted, subject to compliance with Staff's conditions at Finding of Fact Nos. 6 and 7, and as set forth in the following Ordering paragraphs.

IT IS FURTHER ORDERED that Cbeyond Communications, LLC, shall file with Docket Control, as a compliance item in this docket, copies of its annual Customer Proprietary Network Information certifications sent to the Federal Communications Commission, beginning the first day Cbeyond Communications, LLC, begins service in Arizona and continuing for twenty-four (24) months.

IT IS FURTHER ORDERED that the Commission's Utilities Division Staff shall monitor the annual filings ordered herein, and if at any time Staff believes Cbeyond Communications, LLC is out of compliance with federal or state rules and laws, within that twenty-four (24) month period, Staff shall seek an Order to Show Cause requiring Cbeyond Communications, LLC to appear and show cause why the Certificate of Convenience and Necessity granted herein, should not be revoked.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

CHAIRMAN

COMMISSIONER

COMMISSIONER

COMMISSIONER

COMMISSIONER

IN WITNESS WHEREOF, I, BRIAN C. MCNEIL, Executive Director of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this 17<sup>th</sup> day of Dec., 2008.

BRIAN C. MCNEIL  
EXECUTIVE DIRECTOR

DISSENT \_\_\_\_\_

DISSENT \_\_\_\_\_

YBK:db

1 SERVICE LIST FOR: CBeyond COMMUNICATIONS, LLC

2 DOCKET NO.: T-20497A-06-0802

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